

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES EDWARD CONEY,

Defendant-Appellant.

UNPUBLISHED

July 12, 2005

No. 252362

Kalamazoo Circuit Court

LC No. 03-000732-FC

Before: Cooper, P.J., and Fort Hood and R. S. Gribbs*, JJ.

PER CURIAM.

Defendant was convicted by a jury of larceny from a person, MCL 750.357. He was sentenced, as a second habitual offender, MCL 769.10, to twenty-eight months to fifteen years in prison. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant contends that he was denied the effective assistance of counsel because his trial attorney did not inform him that he was being charged as an habitual offender or how that charge could impact upon his sentencing. Defendant claims that the prosecutor offered a plea to armed robbery with a maximum sentence cap of five years, but he rejected the offer because he was not properly informed by his trial counsel. Defendant argues that if he had been properly advised, he would have accepted the plea offer. We find no evidence to support defendant's position.

Defendant's failure to timely move for an evidentiary hearing or a new trial on the basis of ineffective assistance of counsel limits this Court's review to mistakes apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996); *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). An attorney's failure to advise his client of a plea bargain offer may be ineffective assistance of counsel. *People v Williams*, 171 Mich App 234, 241-242; 429 NW2d 649 (1988). The defendant has the burden of proving by a preponderance of the evidence that a plea offer was made and that his counsel failed to communicate it to him. *Id.*

The record shows that defendant received documentary notice that he was being charged as an habitual offender, waived arraignment, and signed a document stating that he had read it, or had it read to him, and understood the substance of all the charges against him. Further review

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

of the record reveals that defendant rejected the prosecutor's offer that, in return for defendant's guilty plea to armed robbery, the prosecutor would drop the second habitual offender charge and there would be no sentence recommendation.

We find that the record does not contain sufficient detail to support defendant's ineffective assistance claim. Thus, he has effectively waived the issue. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). There is no evidence to support defendant's claim that he was offered a maximum sentence cap of five years. Because "the existing record does not disclose what information or advice, if any, defendant received" regarding the habitual offender charge, further appellate review is foreclosed. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Defendant may not enlarge the record on appeal by the use of affidavits. *People v Nash*, 244 Mich App 93, 99; 625 NW2d 87 (2000).

Affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Roman S. Gribbs